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Supreme Court of the United States

October Term, 1970

No. 113

HONORABLE BERNARD M. DECKER, UNITED STATES DISTRICT JUDGE, ET AL.,
Petitioners,

v.

HARPER & ROW PUBLISHERS, INC., ET AL.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

BRIEF, AMICUS CURIAE, OF THE COMMONWEALTH OF VIRGINIA ON BEHALF OF THE RESPONDENTS

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The Commonwealth of Virginia on behalf of the Virginia State Bar, by the Attorney General of Virginia, respectfully presents this brief amicus curiae in support of the respondents pursuant to paragraphs 4 and 5 of Rule 42 of the Rules of the Supreme Court of the United States.

The Virginia State Bar Council, an agency of the Commonwealth, on October 10, 1970, unanimously adopted a resolution requesting this action (Appendix I). The resolution expressed the opinion that the issue in this case was critical to the preservation of the integrity of the attorney-client relationship.

Any constriction of the attorney-client privilege is considered by the Commonwealth of Virginia to be inimical to the preservation of our present legal system. The "control-group" test adopted in the court below which results in such a constriction, as applied to corporations and corporate employees, has such an effect and should be rejected by this Court.

In essence the test limits the privilege of attorney-client confidentiality in the corporate setting, to those corporate agents who will play a substantial role in determining how the corporation will act upon the advice received from counsel.

The rule would drastically affect the effectiveness of counsel in his role as an advisor to the corporation and as its advocate when it is confronted with litigation.

In an age where corporations are confronted with a myriad of the statutes, and rules and regulations of various levels of governments and regulatory agencies, the advice of attorneys is critical. The formulation of policies, procedures and practices of corporations most often begins with field personnel rather than on the executive level. These persons must consult with and supply complete factual information to counsel in order that sound legal evaluation and decisions can be made. Yet the control group test of confidentiality offers these field personnel no protection whatsoever. The obvious result is that this level of personnel will become more inhibited in its communications with counsel. Counsel in turn is faced with providing advice based upon a slanted presentation of facts. Corporate officers accustomed to making informed decisions on considered legal opinions will be placed in a position similar to playing Russian roulette with the corporate entity. A rule leading to such results must be considered unwise, if not foolish.

The effect of the "control group" test on litigation, both civil and criminal, is to undermine our traditional adversary system of justice. If we assume that the adversary system is the most effective method of arriving at the truth, the control group test must be rejected. Acceptance of the test is tantamount to a rejection of the adversary system.

In its present form, our system of justice is founded on the premise that when two litigants present the facts, as they know them in their strongest light, the trier of fact will be able to discern the truth. Where either or both of the combatants is placed at a disadvantage with regard to his obtaining the facts, the truth as determined by the trier must be shaded.

When a corporation encounters litigation, it becomes incumbent upon counsel to determine the factual situation from any corporate agent who possesses knowledge of the facts. Many times these agents risk personal civil or criminal liability as a result of the litigation. Such persons must be assured that their communications to counsel are protected. If not the information they give will be slanted, incomplete or refused. Again, counsel is faced with making crucial legal decisions without a full understanding of the factual situation. The courts, counsel, the parties and the community are deprived of the advantages of the adversary system, because one of the advocates is not able to present his case in its best light. Technically, the control group test is a tool of discovery by an advocate. The logical result, however, is that both advocates will be denied complete access to the true facts; both will work with less than the truth. To conclude from this that a court will then be in a position to arrive at the truth is a logical impossibility in our present system.

For these reasons and for those stated by the American Bar Association in its Brief Amicus Curiae In Support of

the Respondents, which are fully adopted herein, the Commonwealth of Virginia urges the Court to affirm the decision of the Court of Appeals in this cause.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and one of counsel for the Commonwealth of Virginia, in the above captioned matter, hereby certify that three (3) copies of this Brief, Amicus Curiae, of the Commonwealth of Virginia on Behalf of the Respondents, have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with airmail postage prepaid this 2nd day of December, 1970, pursuant to the provisions of Rule 33 of the Rules of the United States Supreme Court as follows:

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APPENDIX I

RESOLUTION

WHEREAS the Council of the Virginia State Bar is of the opinion that the integrity of the attorney-client relationship must be maintained inviolate in all respects consistent with the administration of justice, including the relationship of attorney with corporate clients; and

WHEREAS the question of the petitioners in the case of *Decker* v. *Harper & Row Publishers, Inc.*, now before the Supreme Court of the United States on writ of certiorari to the United States Court of Appeals for the Seventh Circuit, does violence to the concept of attorney-client privilege; and

WHEREAS the brief amicus curiae filed in said court on behalf of the American Bar Association in support of respondents expresses the position of the Virginia State Bar;

NOW, THEREFORE, BE IT RESOLVED by the Council of the Virginia State Bar that the officers hereof are authorized and directed, if permitted to do so, pursuant to the Rules of Court, to cause to be filed in the said Supreme Court of the United States, the motion of the Virginia State Bar for leave to join in the brief of the American Bar Association as amicus curiae in said case.

The above resolution was adopted unanimously by the Council of the Virginia State Bar on October 10, 1970.

/s/ N. S. CLIFTON
N. Samuel Clifton,
Executive Director